

Congress of the United States

Washington, DC 20515

November 27, 2023

VIA Federal eRulemaking Portal

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Comments on Proposed Rule: Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, 88 Fed. Reg. 66752 (September 28, 2023), (RIN): 0970-AD03, Docket ID 2023-21274)

Dear Secretary Becerra,

We write to express our deep concerns with the U.S. Department of Health and Human Services' (HHS) Proposed Rule, "Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B," 88 Fed. Reg. 66752. This proposed rule places requirements on state child welfare agencies to "ensure the availability of safe and appropriate placements and services for children in foster care who identify as LGBTQI+." We wholeheartedly believe that all children in foster care deserve safety, met needs, and stability. But we believe the rule will have the opposite effect of this stated purpose. We believe this regulation, if finalized, would undermine the vital support of faith-based child welfare service providers, impede states' regulatory power, and place children and adolescents at undue risk.

Background

Title IV-B of the Social Security Act was established by Congress in 1935 with the purpose of promoting "state flexibility in the development and expansion of a coordinated child and family services program that utilizes community-based agencies and ensures all children are raised in safe, loving families."¹ Title IV-E of the Social Security Act was later established by Congress through the Adoption Assistance and Child Welfare Act of 1980 with the intent of the federal government partnering with states to provide assistance and support the provision of foster care, adoption assistance, and guardianship assistance to children.²

As you are aware, the foster care system in the United States is in deep crisis. The most recent Adoption and Foster Care Analysis and Reporting System (AFCARS) report identified 407,318 children and adolescents in foster care during Fiscal Year 2021, of which 113,589 awaited adoptions.³ While children are desperately in need of foster homes, the number of foster homes is declining. Consider these statistics about foster homes:

- From 2018 to 2019, 14 states and the District of Columbia experienced a decline in the number of foster homes.⁴
- Every year, 30 to 50 percent of foster parents leave the system.⁵
- In Massachusetts, where faith-based adoption agencies have been banned, the state lost 2,000 foster families from 2014 to 2019.⁶
- Similarly, in Illinois where faith-based adoption agencies are also banned, the state lost 5,352 foster families from 2012 to 2019.⁷

¹ Sec. 421. [42 U.S.C. 621] https://www.ssa.gov/OP_Home/ssact/title04/0421.htm

² Sec. 470. [42 U.S.C. 670] https://www.ssa.gov/OP_Home/ssact/title04/0470.htm

³ <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf>

⁴ *Non-relative Foster Homes 2012-2019*, Chronicle for Social Welfare, WHO CARES: A National Count of Foster Homes and Families, (April 28, 2020), <https://www.fostercarecapacity.com/data/non-relative-homes>

⁵ Haskins, Kohomban, Rodriguez, "Keeping up with the caseload: How to recruit and retain foster parents," Brookings Institute, April 24, 2019, <https://perma.cc/Z4G7-65XA>

⁶ <https://www.bostonglobe.com/metro/2019/04/13/foster-families-dcf-failing/1SlwDvK7MLDCyFaLVi9ZeP/story.html>

- Every year, 20,000 kids age out of foster care without an adoptive home.⁸

The Role of Faith-Based Providers

Faith-based providers are helping provide a solution to the foster care crisis by providing quality, loving care rooted in a deep calling and conviction to care for those in need. Studies have revealed that 82% of families point to faith-based or church support as a factor for successful fostering.⁹ Additionally, the retention of foster families is strengthened by faith-based support; families recruited through church or religious organizations foster 2.6 years longer than other foster parents.¹⁰

Targeting of Faith-Based Providers

While we appreciate the Department's acknowledgement of the vital role that religious providers play in the child welfare system, this proposed rule implies that an individual or organization with sincerely held religious or moral beliefs related to traditional marriage and sexuality is *incapable* of providing a "safe and appropriate" environment for children and adolescents who identify as LGBTQI+. This premise is wrong and harmful and will lead to more children without foster homes.

This proposed rule undermines the important role faith-based providers play by designating certain providers as "safe" and implying faith-based providers are "unsafe." This standard denigrates people of faith. By directing states and tribes to enact policies which deem faith-based providers as unsafe and inappropriate, this proposed rule will minimize the number of available providers that can foster children, increasing the likelihood that they will not be placed and expanding the time it will take to find a placement.

This rule also implies that "affirmation" of LGBTQI+ identity, regardless of sincerely held religious and moral convictions, is the only "safe and appropriate" response. The rule implies that to not affirm a child's sexual orientation or gender identity is "abuse." This is a harmful and dangerous precedent to establish in law and could have substantial implications in adoption and custody disputes.

Fulton v. Philadelphia

On June 17, 2021, the U.S. Supreme Court ruled unanimously in the case of *Fulton v. City of Philadelphia*.¹¹ The Court held that the city of Philadelphia violated the free exercise clause of the First Amendment in refusing to renew a religious foster care agency's contract because they refused to accept same-sex couples as foster parents based on religious grounds. In doing so, the Court affirmed that the government cannot discriminate against faith-based providers in government child welfare programs on the basis of their religious beliefs.

⁷ *Non-relative Foster Homes 2012-2019*, Chronicle for Social Welfare, WHO CARES: A National Count of Foster Homes and Families, (April 28, 2020), <https://www.fostercarecapacity.com/data/non-relative-homes>

⁸ *The AFCARS Report*, U.S. Dep't of Health & Human Services, Children's Bureau, <https://perma.cc/EJ5K-CBVY>_at 3.

⁹ Cheryl Buehler, Mary Ellen Cox, & Gary Cuddeback, *Foster Parents' Perceptions of Factors that Promote or Inhibit Successful Fostering*, 2 *Qualitative Social Work*, no. 1, 2003, at 61-83, <https://perma.cc/F3KE-BU3F>. Many studies have demonstrated that faith is often a strong motivating factor in the decision to become a foster parent. See, e.g., Michael Howell-Moroney, *The Empirical Ties Between Religious Motivation and Altruism in Foster Parents: Implications for Faith-Based Initiatives in Foster Care and Adoption*, 5 *Religions*, no. 3, 2014, at 720-737; Jason D. Brown, Natalie George, David St. Arnault, & Jennifer Sintzel, *Cultural Worldviews of Foster Parents*, 14 *Journal of Family Social Work*, no. 1, 2011, at 21-42; Susan Rodgers, Anne Cummings, & Alan W. Leschied, *Who is Caring for Our Most Vulnerable Children? The Motivation to Foster in Child Welfare*, 30 *Child Abuse & Neglect*, no. 10, 2006, at 1129-1142; Angela C. Baum, Sedahlia Jasper Crase, & Kirsten Lee Crase, *Influences on the Decision to Become or Not Become a Foster Parent*, 82 *Families in Society*, no. 2, 2001, at 202-213; Ramona Denby & Nolan Rindeisch, *African Americans' Foster Parenting Experiences: Research Findings and Implications for Policy and Practice*, 18 *Children and Youth Services Review*, no. 6, 1996, at 523-551.

¹⁰ People who hear about fostering through a church or religious organization fostered for 2.6 years longer than other foster parents. Mary Ellen Cox, Cheryl Buehler, & John G. Orme, *Recruitment and Foster Family Service*, 29 *J. Soc. & Soc. Welfare*, no. 3, 2002, at 166-68, <https://perma.cc/P4SV-MTP4>

¹¹ *Fulton v. Philadelphia*, 593 U.S. ____ (2021).

As the proposed rule acknowledges, *Fulton* applies to this context. Denying faith-based providers the opportunity to be foster parents to certain children, or that they are an inadequate placement based on their religious beliefs about marriage, gender, or sexuality would be a gross violation of *Fulton* and would not withstand a court challenge. Shifting the responsibility of removing faith-based providers onto states does not change that outcome.

Federalism

We also express deep concern regarding the federalism implications of this NPRM, as it will impose significant financial and administrative burdens on state agencies and impede states' regulatory authority in this area. ACF acknowledges that this proposed rule will have a "substantial direct impact on the cost that title IV-E agencies will incur" and that "a majority of states would need to expand their efforts to recruit and identify providers and foster families."¹² While you acknowledge your Department's intention to alleviate the burden on states by providing federal title IV-E funding for a portion of the costs, it remains noteworthy that states will still bear the responsibility for funding up to half of the costs resulting from this proposed rule. Further, we are alarmed that this NPRM will impose administrative challenges on agencies, given that many states already face prolonged wait times and case backlogs when trying to place children into the foster care system.

Additionally, we are alarmed at the potential impact of this rule on states' regulatory authority. The absence of definitions for terms used as requirements such as "age-appropriate resources," "services," and "activities" that "support the [child's] well-being" leaves significant concerns as to how this NPRM will interface with the increasing number of states that have enacted laws safeguarding minors from harmful and irreversible medical "gender transition" procedures. Therefore, at a minimum, we urge HHS to clarify that these terms do not include harmful "gender transition" procedures such as puberty blockers or cross-sex hormones.

Given these concerns, we remind the Department that Executive Order 13132 requires Federal agencies to consult with state and local officials before implementing actions with federalism implications.¹³ While ACF has expressed its intent to consult with such officials in the future, we note that this crucial step has not yet been taken despite the far-reaching federalism implications of this NPRM.

Safety and Security of Children and Adolescents

We are concerned that the safety and well-being of foster youth children and adolescents is put at undue risk by this NPRM. Under the proposal, children will be exposed to questions about sexuality at a time of their peak development before and after puberty. While conversations about physical development are natural and appropriate at certain ages, encouraging children to consider interventions to make them look like a sex other than their biological sex could be extremely detrimental to their natural development and impose long-term health consequences.

Another danger of the NPRM is the requirement that states provide means for children to be placed in sex-specific facilities consistent with their "self-identified gender identity," not their biological sex. This requirement disregards the safety and privacy interests of children, especially girls, and opens the door for a child to be placed in a mixed-sex setting that they find uncomfortable and invasive or, at worst, unsafe.

Conclusion

Every child deserves a safe and loving home, met needs, and firm stability. The exigencies of foster children and youth in the United States are growing and diverse; the child welfare system must respond effectively and urgently. As Members of Congress, we are committed to the pursuit of policies that support children, families, providers, and communities. This proposed rule, however, undermines the crucial role of faith-based providers in foster care, imposes on the states' ability to regulate, and threatens the safety and security of foster care children and adolescents. We urge its immediate rescission.

Sincerely,

¹² "Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-E," 88 Fed. Reg. 66752.

¹³ Executive Order 13132, Fed. Reg. Vol. 64, No. 153, August 4, 1999, <https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf>.



Robert B. Aderholt
Member of Congress



Josh Brecheen
Member of Congress



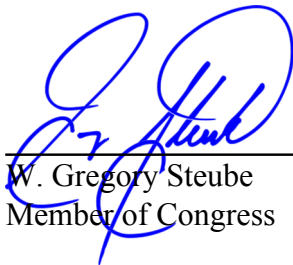
Mary E. Miller
Member of Congress



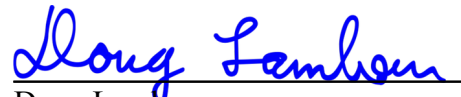
Ben Cline
Member of Congress



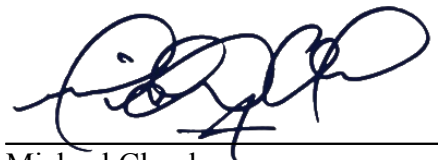
Jeff Duncan
Member of Congress



W. Gregory Steube
Member of Congress



Doug Lamborn
Member of Congress



Michael Cloud
Member of Congress




Rich McCormick, MD, MBA
Member of Congress




Erin Houchin
Member of Congress



Andrew Ogles
Member of Congress



Lauren Boebert
Member of Congress



Christopher H. Smith
Member of Congress